

WILMER CUTLER PICKERING  
HALE AND DORR<sup>LLP</sup>

September 23, 2004

**By Hand**

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2nd Floor  
Boston, Massachusetts 02110

Mark C. Kalpin

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Re: D.T.E. 04-76 – Petition for Clarification as to the Extent of Applicability of Certain Provisions of M.G.L. c. 164 and 165

Dear Secretary Cottrell:

Enclosed for filing in the above-referenced matter is the Response of Aquaria LLC to the Department's Information Request Set # 3.

Thank you for your attention to this matter.

Sincerely,



Mark C. Kalpin

Enclosure

cc: Caroline M. Bulger, Hearing Officer  
A. John Sullivan, Analyst, Rates and Revenue Division  
Service List  
dte.efiling@state.ma.us

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Aquaria LLC	)	
Petition to the DTE for Clarification as to the	)	<b>D.T.E. 04-76</b>
Extent of Applicability of Certain	)	
Provisions of M.G.L. c. 164 and c. 165	)	
	)	
September 23, 2004	)	
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**RESPONSE OF AQUARIA LLC TO DTE  
INFORMATION REQUEST SET # 3**

*Aquaria LLC  
D.T.E. 04-76  
Response to DTE #3  
September 23, 2004  
Person Responsible: Juan Pablo Diaz Batanero*

***DTE 3-1 Refer to G.L. c. 164, § 14. Please describe why the loan agreement is “reasonably necessary.”***

As an initial matter, Aquaria notes that it is a limited liability company, and not a corporation. A more complete discussion of the rationale supporting this conclusion is set forth in Aquaria’s response to DTE 1-1. Because of its corporate form, Aquaria is not subject to the requirements of M.G.L. c. 164, §§ 3 through 33. *See Dartmouth Power Associates*, D.P.U. 90-142 (July 2, 1990). As a result, the requirement under Section 14 that the Department find that an incurrence of indebtedness is “reasonably necessary” is not applicable in the case of Aquaria.

Notwithstanding the non-applicability of Section 14 to the Water Treatment Facility, Aquaria submits that the Loan Agreement is reasonably necessary to the construction and operation of the project. As indicated in the response to DTE 2-3, the Water Purchase Agreement requires Aquaria to contribute as equity to the project at least 15% of the total cost of the project. The remainder of the cost of the project will be financed pursuant to the Loan Documents, which are typical of the sort used for the construction of significant capital projects such as the Water Treatment Facility. Furthermore, and as was discussed in the response to DTE 2-1, the rate which is set for the City of Brockton under the Water Purchase Agreement is not related to the method in which Aquaria finances its proposed project.

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***DTE 3-2      Please state the date that the desalinization plant will be completed and functional.***

Assuming that all required permits, authorizations, and approvals for the project are timely received, Aquaria intends to commence construction of the project in the Spring of 2005. Barring any unforeseen difficulties, construction should take approximately 2 years, and completion of construction is expected to occur in the Spring of 2007.

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***DTE 3-3      Please provide Aquaria's balance sheet for the most recently available reporting period.***

Aquaria will provide the requested information to the Department as a supplement to this response within the next five days.

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***DTE 3-4 Please refer to the Water Purchase Agreement between the City of Brockton and INIMA.***

***(a) Explain how this contract governs Aquaria's sale of desalinated water to Brockton.***

Numerous sections of the Water Purchase Agreement specify the volume of desalinated water that Aquaria is obligated to deliver to the City of Brockton from the Project, and the price that the City of Brockton is obligated to pay for that desalinated water, over the initial 20 year term of the agreement.

For example, Section 5.2 establishes a Firm Commitment on the average volume of water that Aquaria is obligated to deliver to the City on a daily basis in any given year, and provides a process for the City to increase that amount on a temporary or permanent basis. Remedies for the failure of Aquaria to deliver the obligated amount of desalinated water to the City are addressed in Section 5.6.3.

The provisions of Article 6 establish a two-part price for water that it sold from the Project to the City. Section 6.1.1 establishes a Fixed Rate that constitutes a fixed annual charge (on a \$/gallon basis) on the City's Firm Commitment, subject to adjustment over time for inflation. Section 6.1.2 establishes a Variable Rate that establishes a fixed charge (on a \$/gallon basis) on the volume of water that is delivered by the Project to the City, subject to adjustment over time for inflation and variations in the cost of electricity. Finally, the Water Purchase includes provisions that address the right of the City to

increase or decrease its commitment for desalinated water over time, and establish the price that is applicable to any such increases or decreases.

***(b) Refer to Recital at J; Article 6.6; and Article 15.5.1.2. Please reconcile these provisions with the Company's request for findings that certain statutory and regulatory provisions are not applicable to it.***

Recital J of the Water Purchase Agreement states that Aquaria “intends to be designated as a regulated industry company” with respect to the Project, and intends to petition the Department for regulated industry status as soon as is appropriate. Sections 6.6 and 15.5.1.2 contemplate the filing by Aquaria of Operation and Maintenance cost information and capital cost information for the project, respectively, with the Department.

In the Petition, Aquaria requested the Department to determine that Aquaria was a water company under Chapter 165 (that is, a designation of regulated industry status in conformance with Recital J of the Water Purchase Agreement). As discussed in further detail below, as well as in Aquaria’s response to the Department’s Briefing Question Set # 1, Aquaria intends to keep detailed financial information in accordance with generally accepted accounting principles (“GAAP”), and proposes to file its audited financial statements with the Department for informational purposes on an annual basis. The audited financial statements that Aquaria will file with the Department will include the information contemplated by Sections 6.6 and 15.5.1.2 of the Water Purchase Agreement.

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As such, Aquaria believes that Recital J, Section 6.6 and Section 15.5.1.2 are fully consistent with each other, and with the regulatory scheme established for limited liability companies operating as wholesale water companies under M.G.L. c. 165.

**(c) Please describe the manner in which the Company will provide the information required by Article 6.6 to the Department.**

Aquaria intends to keep detailed financial information in accordance with GAAP. Aquaria proposes to file its audited financial statements with the Department for informational purposes on an annual basis, and is willing to accept a condition in any authorization granted to it under Chapter 165 to that effect. The financial statements that are filed with the Department on an annual basis by Aquaria will include, among other items and as is required by Section 6.6 of the water Purchase Agreement, costs associated with the Operation and Maintenance of the project. As was discussed in greater detail in Aquaria's responses to BQ 1-1 and BQ 1-3, Aquaria believes that the annual submission of audited financial statements with this information by Aquaria would comply with the applicable requirements of Chapter 164 and the Department's regulations.

**(d) Please describe the manner in which the Company will provide the information required by Article 15.5.1.2 to the Department.**

Section 15.5.1.2 establishes the price that the City of Brockton would pay for the project in the event that the City exercises its option to purchase the project under the Water Purchase Agreement. The capital cost information specified in Section 15.5.1.2



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will be included in the audited financial statements that Aquaria proposes to file with the Department on an annual basis.

**(e) Please refer to G.L. c. 30B, § 7. Would a designation of Aquaria by the Department as an aqueduct company satisfy the “regulated industry company” provision found in Article 15.1(m)?**

M.G.L. c. 30B, § 7, defines a regulated industry company by reference to M.G.L. c. 25, § 3, which in turn defines a regulated industry company as “any corporation, city, town or other governmental subdivision, partnership or other organization ... which is ... in any respect made subject to the supervision or regulation of the department by any provision of law except chapter 110A of the General Laws and chapter 651 of the Acts of 1910, as amended.” As discussed in Aquaria’s response to DTE 1-1, Aquaria falls within the definition of a “water company” under Chapter 165.

Section 12 through 27 of Chapter 165 impose certain obligations on “aqueduct companies.” Unfortunately, none of those sections define the term “aqueduct company,” and Aquaria is not aware of any Department precedent that establishes such a definition.

On its face, the Department’s designation of Aquaria as an “aqueduct company” under Chapter 165 would satisfy the “regulated industry company” requirement set forth in Section 15.1(m) of the Water Purchase Agreement. Given the lack of an established definition for the term “aqueduct company,” as well as the lack of any Department precedent on the scope of actions that an aqueduct company is authorized or prohibited from undertaking, Aquaria is concerned that such a designation may not enable Aquaria


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to undertake its proposed project in the manner envisioned by the Water Purchase Agreement.

More specifically, if an “aqueduct company” is a company that engages only in the transmission and distribution of water – as opposed to the transmission, distribution and sale of water (as contemplated by the definition of a water company) – then Aquaria would not be an aqueduct company, and would not be able to sell desalinated water to the City of Brockton under the Water Purchase Agreement. In addition, if the Department were to determine that Aquaria is an aqueduct company, then a number of statutory provisions still would not be applicable to Aquaria, on the grounds that those provisions apply only to corporations, and not to limited liability companies such as Aquaria. Those provisions include M.G.L. c. 165, §§ 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, M.G.L. c. 158, and M.G.L. c. 166, §§ 4 - 10. Aquaria would, of course, comply with the provisions of M.G.L. c. 165C, which do apply to limited liability companies.

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I hereby certify that I have on this day caused the Response of Aquaria LLC to the Department's Information Request Set # 3, to be sent via first class mail to the service list in this matter in accordance with the requirements of 220 C.M.R. 1.05 of the Department's Rules of Practice and Procedure.

  
Mark C. Kalpin, Esq.

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